Legislative Summary LS-478E

BILL C-29: AN ACT TO AMEND THE *CRIMINAL CODE* (MENTAL DISORDER) AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

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LEGISLATIVE HISTORY OF BILL C-29

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-29: AN ACT TO AMEND THE *CRIMINAL CODE* (MENTAL DISORDER) AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS*

INTRODUCTION AND HIGHLIGHTS

Bill C-29, An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts, was introduced by the Minister of Justice and received first reading in the House of Commons on 29 March 2004.(1) On 3 May 2004, it was referred before second reading to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

The bill is intended to expand the powers of provincial and territorial Review Boards, the legal bodies that make decisions about the detention, supervision and release of mentally disordered accused persons, by allowing them to order psychiatric assessments, adjourn hearings and extend the time for review of an accused's disposition (i.e., sentence). The bill also allows victim impact statements to be read at hearings and gives Review Boards the power to issue publication bans similar to courts. With respect to accuseds who are permanently unfit to stand trial, Bill C-29 permits Review Boards to recommend a court inquiry at which the court may order a judicial stay of proceedings where the accused poses no threat to public safety. The proposed amendments also streamline the provisions allowing the transfer of an accused to another province or territory, and expand the options open to a peace officer who arrests an accused who is in contravention of an assessment order or a disposition. Finally, Bill C-29

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts, Bill C-29, 3rd Session, 37th Parliament, 2004 (Minister of Justice I. Cotler), available at http://www.parl.gc.ca/PDF/37/3/parlbus/chambus/house/bills/government/C-29_1.pdf.

repeals unproclaimed provisions of the *Criminal Code* relating to the maximum period that a person may be detained, dangerous mentally disordered accuseds, and hospital orders.(2)

BACKGROUND

A. The Mental Disorder Provisions of the *Criminal Code*(3)

1. Brief History

Canada's first *Criminal Code* of 1892(4) made the "insanity defence" available to an accused person who, because of a "natural imbecility" or "disease of the mind," was incapable of appreciating the nature and quality of the act or omission, and of knowing it was wrong. The defence rests on the principle that, in order to convict, the state must prove not only a wrongful act but also a guilty mind. The statutory defence is based on a common law defence formulated by the British House of Lords in 1843.(5)

In 1991, Parliament adopted Bill C-30,(6) which contained provisions on mental disorder to be included in a new Part XX.1 of the *Criminal Code* (the "Code").(7) The reform was suggested and developed over a period of over 15 years, during which there was a study by

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(2) See Department of Justice Canada, News Release, "Justice Minister Introduces Measures to Modernize Mental Disorder Provisions," Ottawa, 29 March 2004; available at http://www.canada.justice.gc.ca/en/news/nr/2004/doc_31144.html. See also Department of Justice Canada, Backgrounder, "Measures to Modernize the Mental Disorder Provisions of the Criminal Code," Ottawa, March 2004; available at http://www.canada.justice.gc.ca/en/news/nr/2004/doc_31146.html.

(3) A history and overview of Canada's mental disorder provisions may also be found in Marilyn Pilon, *Mental Disorder and Canadian Criminal Law*, PRB 99-22E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 22 January 2002; available at http://lpintrabp.parl.gc.ca/lopimages2/PRBpubs/bp1000/prb9922-e.asp. See also Standing Committee on Justice and Human Rights, 14th Report, *Review of the Mental Disorder Provisions of the Criminal Code*, Ottawa, June 2002, available at http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Studies/Reports/JUSTRP14-e.htm.

(4) S.C. 1892, c. 29, s. 11.

(5) *Daniel M'Naghten's Case* (1843), 8 E.R. 718 (H.L.).

(6) *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and Young Offenders Act in consequence thereof*, S.C. 1991, c. 43. Most of the legislation was proclaimed on 4 February 1992.

(7) *Criminal Code*, R.S.C. 1985, c. C-46, ss. 672.1 to 672.95. For this legislative summary, particular use was made of *Martin's Annual Criminal Code*, Canada Law Book, Aurora, Ontario, 2004, pp. 1132-1193.

the Law Reform Commission of Canada,[8] a review by the Department of Justice Canada,[9] a draft bill,[10] and a Supreme Court of Canada decision[11] finding that the automatic detention of persons found not guilty by reason of insanity infringed ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms*.[12]

2. Overview of Bill C-30 and the Current Scheme

When the majority of Bill C-30 was proclaimed in 1992, it replaced references to "natural imbecility" and "disease of the mind" with the term "mental disorder" and extended the defence to summary conviction in addition to indictable offences. Rather than being found "not guilty by reason of insanity," an accused may now be found "not criminally responsible on account of mental disorder." Such a verdict no longer automatically results in "strict custody," as was previously the case when provincial lieutenant governors in council had jurisdiction over persons found insane or unfit to stand trial and could detain them at pleasure.[13]

Under the *Criminal Code*, every person is presumed not to suffer from a mental disorder (s. 16(2)) and presumed to be fit to stand trial (s. 672.22). The burden of proof that an accused was suffering from a mental disorder at the time of the offence so as to be exempt from criminal liability rests with the party who raises the issue (s. 16(3)). The issue of fitness to stand trial may be tried of the court's own motion or on application of the accused or prosecutor. If it is tried on application by a party, that party has the burden of proof (s. 672.23).

Where a court finds that an accused is not criminally responsible on account of mental disorder, or that the accused is unfit to stand trial, it may choose one of three dispositions: an absolute discharge, a conditional discharge (i.e., living in the community with conditions) or

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(8) Law Reform Commission of Canada, *The Criminal Process and Mental Disorder*, Working Paper 14, Ottawa, 1975; and Law Reform Commission of Canada, *Mental Disorder in the Criminal Process*, Ottawa, March 1976.

(9) Government of Canada, *The Criminal Law in Canadian Society*, Ottawa, August 1982; Department of Justice Canada, *Mental Disorder Project, Discussion Paper*, Ottawa, September 1983; and Department of Justice Canada, *Mental Disorder Project, Criminal Law Review*, Final Report, Ottawa, September 1985.

(10) Proposed amendments to the *Criminal Code* (mental disorder), dated 23 June 1986, Sessional Paper No. 331-7/50, 1st Session, 33rd Parliament (Minister of Justice J.C. Crosbie), tabled on 25 June 1986.

(11) *R.* v. *Swain*, [1991] 1 S.C.R. 933.

(12) *Canadian Charter of Rights and Freedoms*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. The Supreme Court suspended the declaration of invalidity of the relevant section of the Code to give Parliament an opportunity to adopt remedial legislation in the form of Bill C-30.

(13) *Criminal Code*, R.S.C. 1970, c. C-34, s. 542(2).

detention in hospital (with or without conditions). Alternatively, the court may refer the decision to the Review Board of the appropriate province or territory.[14] Even when the court makes a disposition, other than an absolute discharge, a Review Board must, within 90 days, hold its own hearing to review the disposition. Courts and Review Boards must impose the least restrictive disposition necessary, having regard to public safety, the mental condition of the accused, and the goal of his or her reintegration into society. Any Review Board disposition other than an absolute discharge must be reviewed annually. Lieutenant governors in council no longer have any role in criminal proceedings involving an unfit or mentally disordered accused.

Bill C-30 specified the circumstances under which a court may order a psychiatric assessment, either for the purpose of determining an accused's fitness to stand trial, or to provide evidence as to his or her mental state at the time of the offence. The admissibility of statements made by an accused during the course of an assessment was limited. Further, Bill C-30 gave the courts new criteria for determining whether an accused person is unfit to stand trial. The courts must review the case of an unfit accused every two years to determine whether sufficient evidence remains to bring the individual to trial (i.e., there is a *prima facie* case). If not, the accused is entitled to an acquittal.

A disposition in relation to a mentally disordered accused may not direct psychiatric or other treatment unless the accused has consented and it is in his or her interests. However, where the court has rendered a verdict of unfit to stand trial and has not yet made a disposition, it may, on application by the prosecutor, order treatment of the accused for a period of not more than 60 days for the purpose of making the accused fit to stand trial. Such a treatment order requires particular medical evidence, must have the consent of the hospital, though not the accused, and may never involve prohibited treatment such as psychosurgery or electro-convulsive therapy.

Where a court or Review Board orders detention in hospital as the appropriate disposition for a mentally disordered accused, the accused is not required to submit to treatment. The disposition is meant to detain the accused in an environment where appropriate medical and psychiatric care is available. In cases where the accused refuses treatment that may be necessary

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(14) Review Boards are established under s. 672.38ff of the *Criminal Code*. There must be at least five members, who are appointed by the lieutenant governor of the province or territory. One member must be entitled to practise psychiatry, and another must also be entitled to practise psychiatry or, alternatively, medicine or psychology and have experience in the mental health field. The chairperson must be a judge, whether currently appointed, retired or qualified for the post.

to maintain good mental health and his or her condition may deteriorate, treatment may be administered in accordance with provincial/territorial mental health legislation and policy.[15]

Most of Bill C-30 came into force on 4 February 1992. However, proclamation has not occurred for three major initiatives: the "capping" provisions that would limit the period of custody of a mentally disordered accused; the "dangerous mentally disordered accused" provisions that would allow the courts to extend the cap to a life term; and the "hospital orders" provisions for convicted offenders who, at the time of sentencing, are in need of treatment for a mental disorder in an acute phase. These and other mental disorder provisions of the Code are discussed in greater detail under Description and Analysis, below.

3. Recent Statistics

In January 2003, the Canadian Centre for Judicial Statistics issued the results of a *Special Study on Mentally Disordered Accused and the Criminal Justice System*. The report indicated that in 2001 Canada had approximately 139 new unfit accused before Review Boards and 581 new accused found not criminally responsible on account of mental disorder. The total number of active cases in Canada was approximately 2,717. The statistics for 2000 were 171 new unfit accused across Canada, 585 new not criminally responsible accused, and 2,665 active cases. These numbers do not reflect the total cases before the courts involving a mentally disordered accused, as an absolute discharge results in no follow-up by a Review Board.[16]

B. Review of the Mental Disorder Provisions

On 10 June 2002, the House of Commons Standing Committee on Justice and Human Rights (the "Standing Committee") tabled 19 recommendations in its *Review of the Mental Disorder Provisions of the Criminal Code* (the "Review").[17] A comprehensive parliamentary review of the legislative scheme had been required by Bill C-30.

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(15) Canadian Centre for Judicial Statistics, *Special Study on Mentally Disordered Accused and the Criminal Justice System*, Catalogue No. 85-559-XIE, Ottawa, January 2003, p. 14; available at http://www.statcan.ca/english/freepub/85-559-XIE/85-559-XIE00201.pdf.

(16) *Ibid.*, p. 26 (Appendix A).

(17) *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and Young Offenders Act in consequence thereof*, s. 36.

Testimony and/or written submissions were provided to the Standing Committee by many interested parties including the Association of Canadian Review Board Chairs, the B.C. Forensic Psychiatric Services Commission, the Barreau du Québec, the Canadian Bar Association, the Canadian Mental Health Association, the Canadian Police Association, the Canadian Psychiatric Association, the Canadian Psychological Association, the Centre for Addiction and Mental Health, the Federal/Provincial/Territorial Working Group on Mental Disorder, the Institut Philippe Pinel de Montréal, the Ministry of the Attorney General of Ontario, the Mood Disorders Society of Canada, Nova Scotia Legal Aid, the Office for Victims of Crime, the Psychiatric Patient Advocate Office, and the Schizophrenia Society of Canada.(18)

On 7 November 2002, the government tabled in the House of Commons its *Response to the 14th Report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the Criminal Code* (the "Response").(19)

Many of the issues considered by either or both of the Standing Committee and the government are discussed in the context of particular clauses of Bill C-29 under Description and Analysis, below. Some of the issues considered but not resulting in proposed amendments are set out in the following sections.

1. Defence and Definition of "Mental Disorder"

The Standing Committee suggested in Recommendation 1 that the defence based on mental disorder in s. 16 of the Code, and the definition of "mental disorder" in s. 2, be retained in their present forms. Section 16 reads:

> 16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

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(18) For a complete list of witnesses and briefs, see Appendixes B (List of Witnesses) and C (List of Briefs) of the Standing Committee's Review.

(19) Government of Canada, *Response to the 14th Report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the Criminal Code*, Ottawa, November 2002; available at http://www.justice.gc.ca/en/dept/pub/tm_md/mdr.pdf ("*Response*"). See also Department of Justice Canada, Backgrounder, "Highlights of the Government Response to the 14th Report of the Standing Committee on Justice and Human Rights: Mental Disorder Provisions," Ottawa, November 2002; available at http://www.canada.justice.gc.ca/en/news/nr/2002/doc_30734.html.

> (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
>
> (3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

"Mental disorder" is defined in s. 2 as "disease of the mind." Its legal meaning has been interpreted to be "any illness, disorder or abnormal condition which impairs the human mind from its functioning, excluding, however, self-induced states caused by alcohol or drugs as well as transitory states such as hysteria and concussion."[20] The defence based on mental disorder requires the disease to be of such intensity as to render the accused incapable of knowing right from wrong in the abstract sense and applying that knowledge in a rational way to the alleged criminal act.[21]

In its Response to the Standing Committee, the government agreed that no changes should be made to the mental disorder defence or definition.[22] It concluded that application of the law by the courts has been fair and consistent, and has balanced the rights of mentally disordered persons and the protection of society.

2. Insane and Non-insane Automatism

The Standing Committee suggested in Recommendation 2 that the definition and application of the law relating to "automatism," both sane and insane, be left to the courts. Automatism refers to unconscious involuntary action where the mind "does not go with what is being done."[23] It may result, for example, from a mental disorder, physical illness or condition, a blow to the head or psychological shock. Sane (or non-insane) automatism is an involuntary act that does not arise from a disease of the mind and entitles the accused to an acquittal. Insane automatism is a result of a disease of the mind and triggers a s. 16 verdict and the application of Part XX.1 of the Code.[24]

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(20) *R.* v. *Cooper*, [1980] 1 S.C.R. 1149 at 1159.

(21) *R.* v. *Oommen*, [1994] 2 S.C.R. 507 at para. 21.

(22) *Response*, pp. 2-3.

(23) See, e.g., *R.* v. *Stone*, [1999] 2 S.C.R. 290 at para. 39, citing *R.* v. *Rabey*, [1980] 2 S.C.R. 513 at 518.

(24) See, e.g., *R.* v. *Parks*, [1992] 2 S.C.R. 871 at 896.

A verdict of non-insane automatism is rare and the courts apply several considerations in determining whether it has been adequately established, including the severity of the triggering stimulus, how one would expect a normal person to react, any history of automatistic behaviour, the presence of a motive, and confirming expert evidence. A verdict of insane automatism is more likely if the cause of the dissociate state is internal or the conduct is likely to reoccur and poses a continuing danger.[25] That being said, the defence of automatism is to be put to a jury where involuntariness has been asserted and is supported by the relevant opinion of a qualified expert.[26]

In its Response to the Standing Committee, the government agreed that the concept of automatism should be left to the courts and should not be codified without a comprehensive review of the General Part of the Code.[27]

3. Fitness to Stand Trial

Under s. 672.22 of the Code, an accused is presumed fit to stand trial unless the court is satisfied to the contrary on a standard of probabilities. "Unfit to stand trial" is defined in s. 2 as meaning "unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel." Where a person is found to be unfit, s. 672.31 requires any plea that has been taken to be set aside and any jury to be discharged.

The Standing Committee suggested in Recommendation 3 that the definition of "unfit to stand trial" be considered with a view to adding any further requirements to determine effectively an accused's fitness to stand trial, including a test of real or effective ability to communicate and provide reasonable instructions to counsel. The basis for the Recommendation was that the current concept of fitness may be overinclusive and result in some persons going to trial who are not actually fit.

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(25) See *R.* v. *Stone*, paras. 59ff, and *R.* v. *Parks*, at 900ff.

(26) *R.* v. *Fontaine*, 2004 SCC 27 at para. 89.

(27) *Response*, pp. 3-4.

In its Response, the government indicated that it would not make any changes, citing the appropriateness of the "limited cognitive capacity test" used by the courts.[28] Under that test, an accused is considered to be fit to stand trial where he or she has the capacity to understand the process and instruct counsel, but the accused is not required to be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves his or her interests.[29]

4. Fitness to be Sentenced

The Standing Committee suggested in Recommendation 4 that the concept of "unfit to be sentenced" be included in the Code so that an accused's fitness could be considered not only before a verdict is rendered but also up to the time of sentencing. It further recommended that courts be able to order a psychiatric assessment to determine fitness to be sentenced, and that Review Boards be given jurisdiction over persons who become unfit after a verdict but before sentencing.

The government indicated in its Response that the introduction of a new legal concept of fitness to be sentenced would require a more comprehensive examination and that current sentencing principles are probably flexible enough to meet the individual circumstances of an accused.[30] The government pointed out that the Code allows assessments to be ordered only in certain situations and expressed concerns about involving provincial and territorial resources if assessments became more frequent. Regarding the jurisdiction of Review Boards, the government stated that extending their authority to cover persons convicted but not sentenced would necessitate a more thorough review.

5. Further Statutory Review

The Standing Committee suggested in Recommendation 19 that amendments to the *Criminal Code* include a requirement for a further review of the provisions and operation of Part XX.1 within five years of the legislation coming into effect, or, if no such legislation is adopted by Parliament, in 2007. The government responded that the timing and scope of a statutory review would be a decision of Parliament.[31]

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(28) *Response*, pp. 5-6.

(29) *R.* v. *Whittle*, [1994] 2 S.C.R. 914 at 934.

(30) *Response*, pp. 7-10.

(31) *Ibid.*, pp. 35-36.

6. Non-legislative Recommendations

The Standing Committee suggested in Recommendations 16, 17 and 18 that the federal, provincial and territorial governments: review their budgets and levels of resources to ensure effective treatment of the needs of mentally disordered accused and offenders; improve education programs on mental health and forensic systems for judges, lawyers, court personnel, law enforcement personnel, corrections staff and the general public; and collaborate with relevant departments and agencies to collect, process, and analyze the data necessary to facilitate a further parliamentary review of Part XX.1 of the Code.

In its Response to the Standing Committee, the government agreed to consult with the provinces and territories on the issues of budgets, resources and education relating to mentally disordered persons.(32) While recognizing that data collection and analysis might be improved, the government pointed out that some useful statistics are already available and that better information gathering depends on available resources.

DESCRIPTION AND ANALYSIS

A. Assessment Orders (Clauses 1 to 11 and 40)

1. Definition of "Assessment" and When Assessment Order Available (Clauses 1 and 2)

An "assessment" is defined in s. 672.1 of the Code as an assessment by a medical practitioner of the mental condition of the accused pursuant to an assessment order. An assessment order may be made by a court under s. 672.11 to determine, among other things, whether the accused is unfit to stand trial, whether the accused is not criminally responsible on account of mental disorder, and what the appropriate disposition in either case should be.

Clause 1 amends the definition of "assessment" to include an assessment ordered by a Review Board under a proposed s. 672.121 (see clause 3). It also makes some stylistic changes to the English and French versions of the definition. Further, clause 1 adds a subsection in the "definitions" section of Part XX.1, stating that references to "Attorney General of a province" in certain sections are to be read as "Attorney General of Canada" in respect of a territory, or proceedings commenced and conducted by or on behalf of the Government of Canada.

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(32) *Ibid.*, pp. 28-34.

Clause 2 repeals paragraph 672.11(e) of the Code, which allows a court to make an assessment order to determine whether there should be a hospital order under s. 747.1(1). This is because section 747.1(1) was never proclaimed in force and is also repealed by Bill C-29 (see clause 39).

2. Power of Review Board to Make Assessment Order (Clauses 3 to 6)

Clause 3 creates a new s. 672.121 allowing a Review Board to order an assessment. Currently, only a court may do so. Clause 3 allows the Review Board having jurisdiction over an accused to make an assessment order where it has reasonable grounds to believe that one is necessary to: (a) recommend that a court hold an inquiry to determine whether there should be a stay of proceedings (see the proposed s. 672.851 in clause 33), or (b) direct under s. 672.54 that the accused be discharged absolutely, discharged with conditions, or detained in hospital.

Clause 3 allows a Review Board to order an assessment for the purpose of determining the appropriate disposition only where no assessment report is available, no assessment has been conducted in the last 12 months, or the accused has been transferred from another province. Otherwise, an existing assessment report must presumably be used. A Review Board would be able to order a new assessment for the purpose of making a recommendation regarding a stay of proceedings for a permanently unfit accused (see the proposed s. 672.851 in clause 33).

Clause 4 provides for an assessment order to be in a new Form 48.1, being an "Assessment Order of the Review Board." Possible paragraphs in Form 48.1 correspond to the two situations where a Review Board may make an assessment order under the proposed s. 672.121 (see clause 3).

Clause 5 allows a Review Board, in addition to a court, to make an assessment order that remains in force for 60 days in "compelling circumstances." Normally, an assessment order may be in force only up to 30 days, and only up to 5 days for the purpose of determining fitness to stand trial. As a Review Board currently does not have the ability to make an assessment order, the current s. 672.14 refers only to a court. Clause 5 also makes some stylistic changes to the English and French versions of s. 672.14(3).

Clause 6 allows a Review Board, in addition to a court, to extend an assessment order if necessary to complete the assessment. The current s. 672.15 allows an extension of up to 30 days with an overall maximum of 60 days for the initial order and all extensions. Clause 6 also changes the time that an application for an extension by either the accused or the prosecutor may be made from "during or after the period that the order is in force" to "during or at the end of the period during which the order is in force." This is presumably to ensure that the application is made soon after the initial order has expired rather than anytime after.

3. Detention of Accused in Custody Pending Assessment (Clause 7)

Clause 7(1), in addition to making a stylistic change in the English version, amends s. 672.16 of the Code to ensure that only a court, and not a Review Board, can order that an accused be detained in custody under an assessment order in certain situations. Under s. 672.16(1), these situations are when: (a) custody is necessary to assess the accused, or custody is desirable according to the evidence of a medical practitioner and the accused consents; (b) custody is required due to another matter or provision in the Code; or (c) the prosecutor shows that custody is justified on a ground set out in s. 515(1) of the Code, such as to ensure the accused's attendance in court, to protect public safety, or to maintain confidence in the administration of justice.

Clause 7(2) adds a subsection to s. 672.16 enumerating the situations where a Review Board can order that an accused be detained in custody under an assessment order. These situations would be when: (a) the accused has been discharged under s. 672.54(b) with a condition requiring him or her to attend or reside at a certain place; (b) there has been a disposition under s. 672.54(c) that the accused be detained in a hospital; (c) custody is necessary to assess the accused, or custody is desirable according to the evidence of a medical practitioner and the accused consents; or (d) custody is required due to another matter or provision in the Code. A prosecutor could not argue before a Review Board (as he or she could when before a court) that custody is justified on another ground. Clause 7(2) also adds a subsection to s. 672.16 under which the evidence of a medical practitioner supporting the detention of the accused, whether before a court or Review Board, can be received in the form of a written report if the accused and prosecutor agree.

Clause 7(3) rewords the English version of s. 672.16(3) of the Code so that where an accused has been detained rather than merely charged under s. 515(6) or 522(2) as a result of certain offences, the assessment order would order detention under the same circumstances already set out. Clause 7(3) does not amend the French version of s. 672.16(3) of the Code,

presumably because the French version refers more generally to subsections 515(6) and 522(2) of the Code, with no reference to the accused being "charged." The current English wording of s. 672.16(3) implies that if the accused has already shown that detention was not justified under s. 515(6) or 522(2), he or she would have to do so again. The amendment makes it clear that only if detention has already been ordered under s. 515(6) or 522(2) would the accused have to be detained under the assessment order, although in that case it appears that the accused would have another opportunity to show that detention is not justified, this time for the purpose of the assessment order.

By way of background, subsection 515(6) of the Code sets out situations where there is a presumption of detention until the accused is dealt with according to law, such as when he or she has committed: an indictable offence while released in respect of another indictable offence; a serious offence in conjunction with a criminal organization; a terrorism offence; an indictable offence and is not ordinarily resident in Canada; or certain drug offences punishable by life imprisonment. Subsection 522(2) of the Code presumes detention where the accused has committed an offence listed in s. 469, such as murder, treason, a crime against humanity or a war crime. For the purposes of ss. 515(6) and 522(2), and therefore an assessment order under s. 672.16(3), an accused may show that detention is not justified by showing within the meaning of s. 515(10) that detention is not necessary to ensure his or her attendance in court, to protect public safety, or to maintain confidence in the administration of justice.

4. Precedence of Assessment Orders and Varying Assessment Orders (Clauses 8 and 9)

Clause 8 amends s. 672.17 of the Code so that only when a court, and not a Review Board, has made an assessment order would such an order take precedence over a bail hearing while the assessment order is in effect. When a Review Board has made an assessment order, the accused can still apply for judicial interim release and the prosecutor can still apply for detention under Part XVI or s. 679 of the Code.

Clause 9 amends the French version of s. 672.18 of the Code so that it is clear that only when a court, and not a Review Board, has made an assessment order, the accused or prosecutor may apply to vary the terms. A Review Board need not be referred to presumably because an application for release or detention remains available under Part XVI or s. 679 of the Code where a Review Board has made an assessment order (see clause 8). Clause 9 does not amend the English version of s. 672.18, as the English version already refers to an assessment order made by a court.

5. Completion of Assessment, Assessment Reports and Form 48.1
(Clauses 10, 11 and 40)

Clause 10 adds a reference to a Review Board in s. 672.191 of the Code so that, whether an assessment order is made by a court or Review Board, the accused must appear as soon as practicable after the assessment is completed and no later than the last day the assessment order is in force.

Clause 11(1) adds a reference to a Review Board in s. 672.2(2) of the Code so that, whether an assessment order is made by a court or Review Board, an assessment report must be filed within the period fixed by the court or Review Board. Clause 11(2) similarly adds a reference to a Review Board in s. 672.2(4) so that, whether an assessment order is made by a court or Review Board, the assessment report must be provided to the prosecutor, accused and accused's counsel, minus any information that the court or Review Board determines should be withheld to protect the safety of another person or the treatment of the accused. Clause 11 also makes some stylistic changes to the English and French versions of s. 672.2(4).

Clause 40 amends the existing Form 48 under Part XXVIII (Miscellaneous) of the Code by renaming it "Assessment Order of the Court," as assessment orders would also be possible by a Review Board in a new Form 48.1. Clause 40 also adds a paragraph that may be used where the purpose of the court's assessment order is to determine whether there should be a stay of proceedings (see the proposed s. 672.851 in clause 33).

6. Who May Conduct Assessments (considered but not proposed)

The Standing Committee recognized a shortage of psychiatrists in some jurisdictions and suggested in Recommendation 10 that persons other than medical practitioners, such as qualified psychologists, be allowed to conduct assessments of whether an accused is fit to stand trial.

In its Response to the Standing Committee, the government questioned the appropriateness of allowing psychologists to conduct assessments, given that many medical conditions may appear to be mental disorders but are not. Psychologists would not be able to provide medical evidence relating to an accompanying treatment order that might enable the accused to become fit. Moreover, qualified forensic psychologists are likely also in short

supply.[33] The government indicated that, in any event, consultation with the provinces would be necessary due to a reliance on provincial mental health resources. Accordingly, no amendment regarding who may conduct an assessment of the mental condition of an accused is included in Bill C-29.

(Clause 12 is discussed in Part E below on Capping of Dispositions and Dangerous Mentally Disordered Accused.)

(Clause 13 is discussed in Part G below on Persons Found Unfit to Stand Trial.)

B. Disposition Hearings (Clauses 14, 19, 15 and 16)

1. Transmittal of Records, Time for Review Board Hearing and Assignment of Counsel (Clauses 14, 19, 15 and 16(1))

When there has been a verdict of not criminally responsible on account of mental disorder or unfit to stand trial, s. 672.45 of the Code gives the court discretion to hold a disposition hearing. If the court does not make a disposition, s. 672.47 requires a Review Board to hold a disposition hearing within 45 days of the verdict, or within 90 days with an extension by the court in exceptional circumstances. Subsection 672.47(3) states that when the court makes a disposition under s. 672.54 other than an absolute discharge, the Review Board must hold another disposition hearing before the court's disposition ceases to be in force and always within 90 days. In other words, when the court's disposition is a discharge with conditions or an order that the accused be detained in hospital, the Review Board must reconsider the disposition within 90 days.

Clause 14 adds a subsection to s. 672.45 so that if a court does not hold a disposition hearing, all relevant transcripts, documents, information and exhibits are sent without delay to the Review Board having jurisdiction. In conjunction with clause 19, clause 14 ensures the timely transmittal of records between a court and Review Board in all cases.

Clause 19 amends s. 672.52(2) of the Code so that where the court holds a disposition hearing under s. 672.45(1), all relevant transcripts, documents, information and exhibits are sent without delay to the Review Board having jurisdiction. Section 672.52(2) currently only requires the transmission of information where the court makes a disposition. Clause 19 also makes some stylistic changes to the English and French versions of s. 672.52(2).

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(33) *Response*, pp. 21-23.

Clause 15 amends s. 672.47(3) so that when the court makes a disposition other than an absolute discharge (i.e., a conditional discharge or detention in hospital), the Review Board hearing will be held simply within 90 days rather than prior to the expiry of the court's disposition, if that happens to be earlier. This is presumably because the 90-day deadline is considered to be reasonable in all cases. Further, Bill C-29 repeals the 90-day limit for an order detaining the accused in a hospital set out in subsection 672.55(2) (see clause 22). Clause 15 also makes some stylistic changes to the French version of s. 672.47(3).

Clause 16 clarifies or changes some of the procedure at a disposition hearing set out in s. 672.5 of the Code. In particular, clause 16(1) amends subsection 672.5(8), currently silent as to the time that counsel should be assigned to an unrepresented accused when he or she is unfit to stand trial or the interests of justice so require, to make it clear that the court or Review Board may assign counsel either before or at the time of the hearing.

2. Power of Review Board to Adjourn Hearing (Clause 16(2))

Clause 16(2) adds a new subsection 672.5(13.1) so that a Review Board may adjourn a disposition hearing for up to 30 days to obtain relevant information or for any other sufficient reason. A court already has the power to adjourn a hearing as part of its inherent jurisdiction to control its own process in any manner not contrary to the *Criminal Code* or other statute.[34]

3. Victim Impact Statements (Clause 16(3))

Clause 16(3) adds three new subsections to s. 672.5 of the Code so that victim impact statements may be presented at a disposition hearing, rather than merely filed under subsection 672.5(14) for the court or Review Board's consideration. The amendment follows the Standing Committee's Recommendation 8. Subsection 672.5(15.1) permits a victim to read or otherwise present a filed statement in a manner that the court or Review Board considers appropriate, unless it would interfere in the proper administration of justice.[35]

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(34) See, e.g., *R.* v. *Keating* (1973), 11 C.C.C. (2d) 133 (Ont. C.A.), cited in *R.* v. *Rose*, [1998] 3 S.C.R. 262 at para. 64.

(35) The concept of "the proper administration of justice" also appears in clauses 13 (extending deadline for review of case against unfit accused), 17 (publication bans) and 33 (stay of proceedings for permanently unfit accused). In *Canadian Broadcasting Co.* v. *New Brunswick (Attorney General) (Re R.* v. *Carson)*, [1996] 3 S.C.R. 480 at para. 58, the Supreme Court said: "The phrase 'administration of justice' appears throughout legislation in Canada, including the *Charter*. Thus, 'proper administration of justice,' which of necessity has been the subject of judicial interpretation, provides the judiciary with a workable standard." In Bill C-29, there are specific factors set out in clause 33 regarding the proper administration of justice when determining whether to grant a stay of proceedings for a permanently unfit accused.

Subsection 672.5(15.2) requires the court or Review Board to inquire whether the victim has been advised of the right to file a victim impact statement. The inquiry must be made as soon as practicable after a verdict of not criminally responsible on account of mental disorder and before a disposition is made at a disposition hearing. Subsection 672.5(15.3) allows the court or Review Board, of its own motion or on application by the prosecutor or victim, to adjourn a disposition hearing so that the victim may prepare a victim impact statement.

Clause 16(3) also amends subsection 672.5(16) so that the meaning of "victim" set out in s. 722(4) of the Code applies to the new subsections (15.1) to (15.3). Section 722(4) defines "victim" as the person to whom harm was done or who suffered physical or emotional loss as a result of the offence, or his or her spouse, common-law partner, relative, custodian, caregiver or dependant, if the person is dead, ill, or otherwise incapable of making a victim impact statement.

4. Victims to Always Be Notified of Rights (considered but not proposed)

The Standing Committee suggested in Recommendation 6 that victims always be notified of their rights and entitlements, such as the right to file a victim impact statement, as well as be notified of a disposition hearing if they have so requested. However, Bill C-29 requires the court or Review Board only to ask whether the victim has been advised of his or her ability to file a victim impact statement and gives the court or Review board discretion to adjourn a hearing so that one may be prepared. The new subsections mirror provisions in s. 722.2 of the Code relating to victim impact statements at a sentencing hearing.

The government indicated in its Response to the Standing Committee that to always notify victims about victim impact statements and the dates of hearings would burden provincial and territorial Crown offices and victim services who may not have sufficient resources.[36] The government pointed out that it has prepared fact sheets, guides and other information for victims, and suggested that provincial and territorial victim services could be encouraged to develop additional public education materials to ensure that victims are aware of their rights and entitlements.

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(36) *Response*, pp. 13-15.

5. Mandatory Appearance of Crown (considered but not proposed)

The Standing Committee suggested in Recommendation 11 that federal, provincial and territorial ministers responsible for justice consider whether the public interest would be better served by the mandatory appearance of provincial Crown attorneys at disposition hearings.

In its Response, the government questioned the necessity of Crown representation at all hearings, given that the Crown receives notice of all Review Board hearings and can be a party if it chooses, many hearings are non-contentious, and the government is not aware of instances where the safety of the public has been jeopardized by the non-appearance of the Crown.(37) As the administration of justice and allocation of Crown resources is a provincial and territorial responsibility, the government indicated that it would consult with other jurisdictions. No amendment regarding the mandatory appearance of a Crown attorney at disposition hearings is included in Bill C-29.

C. Publication Bans (Clauses 17 and 18)

1. Power of Review Board to Order Publication Ban (Clause 17)

Clause 17 adds a new section 672.501 to the Code requiring or allowing a Review Board in certain circumstances to issue an order restricting the publication of information, whether through a document, broadcast or any other transmission, that would identify the victim or witnesses in a disposition hearing for an accused declared not criminally responsible on account of mental disorder or unfit to stand trial. Courts are already authorized to issue publication bans under s. 486 of the Code, and provisions in that section are mirrored in the proposed s. 672.501.

The following summarizes the twelve subsections of the new s. 672.501:

> (1) A Review Board must order a publication ban with respect to the identity of the victim and of witnesses under the age of 18 where the accused is charged with a sexual or other offence referred to in s. 486(3) of the Code (e.g., sexual interference or touching involving a young person, sexual assault, extortion, demanding a criminal interest rate).

(37) *Ibid.*, p. 23.

(2) A Review Board must order a publication ban with respect to the identity of witnesses under the age of 18 and any person depicted in material constituting child pornography where the accused is charged with an offence relating to child pornography under s. 163.1 of the Code.

(3) A Review Board may order a publication ban where the accused is charged with any other offence, on application of the prosecutor, victim or witness, if satisfied that it is necessary for the proper administration of justice.

(4) A publication ban does not apply to the disclosure of information in the course of the administration of justice if the purpose is not to make the information known in the community. This subsection is presumably intended to permit the disclosure of the identity of victims or witnesses to courts, police, other Review Boards, and possibly other parties who require the information for certain limited purposes.[38]

(5) An application for a discretionary publication ban under subsection (3) must be made in writing and the applicant must give notice to the prosecutor, accused and any other person affected.

(6) An application for a discretionary ban under subsection (3) must set out the grounds on which the order is necessary for the proper administration of justice.

(7) The Review Board may hold a hearing for a discretionary publication ban under subsection (3) and the hearing may be private.

(8) In determining whether there should be a discretionary publication ban, a Review Board must consider the following factors: the right to a fair and public hearing; any real and substantial risk of significant harm to the victim or witness if their identity were disclosed; whether the order is necessary for the security of the victim or witness or to protect them from intimidation or retaliation; society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; any effective alternatives to protect identity; any salutary or deleterious effects of a publication ban; the impact of a publication ban on freedom of expression of those affected by it; and any other relevant factor.

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(38) See, e.g., *R.* v. *J. (R.L.)*, 1999 CarswellSask 98 (P.C.), where the court, under the identically worded s. 486(3.1), allowed victims' identities to be disclosed to a school board that required the information to determine whether the victims were students of the accused and should therefore affect the accused's employment. The judge stated that "for the purpose of the administration of justice" included the impartial adjudication of conflicting claims, i.e., between the school board and accused with respect to the latter's employment.

> (9) A discretionary publication ban under subsection (3) may be subject to any conditions the chairperson of the Review Board thinks fit.
>
> (10) Unless the Review Board refuses to order a publication ban, no person shall publish, broadcast or otherwise transmit the contents of the application, evidence and information provided at the publication ban hearing, or any other information that could identify a victim or witness to whom the application relates.
>
> (11) Every person who fails to comply with a mandatory or discretionary ban is guilty of an offence punishable on summary conviction.
>
> (12) For greater certainty, where there are proceedings against a person who fails to comply with a publication ban, the publication ban continues to prohibit the disclosure of information that could identify the person whose identity is protected.

2. No Disclosure of Withheld Disposition Information (Clause 18)

Section 672.51 of the Code sets out the circumstances where an assessment report or other written information provided to the court in order to make a disposition ("disposition information") may be withheld from a party. It may be withheld from the accused under subsection (3) where disclosure would endanger the life or security of another person or impair the treatment or recovery of the accused, provided that the interests of justice do not make disclosure essential under subsection (4). Under subsection (5), disposition information may be withheld from a party who is not the Crown or accused where it is not necessary and may be prejudicial to the accused. Under subsection (7), no disposition information may be disclosed to a person who is not a party to the proceedings, where the information is withheld from any party or disclosure would seriously prejudice the accused and protection of the accused outweighs the public interest in disclosure. An accused may be excluded from all or part of a disposition hearing under s. 672.5(10)(b)(ii) or (iii) in order to ensure his or her treatment or recovery, protect the life or safety of another person, or determine whether grounds exist for excluding the accused.

Clause 18 amends s. 672.51(11) to clarify that information used in a disposition hearing may not be disclosed where a court or Review Board determines that the information should be withheld. In particular, where information is withheld from a party under another subsection of s. 672.51(11), or the accused is excluded from the proceedings under

s. 672.5(10)(b)(ii) or (iii), the amendment requires that no person disclose the withheld information or portion of the proceedings from which the accused is excluded by way of any document, broadcast or other transmission. Subsection 672.51(11) currently prohibits disclosure only by way of a broadcast or in a "newspaper" as defined in another section of the Code.

As they concern clauses 17 and 18, coordinating amendments should be noted in clause 64, discussed below in Part K on Coordinating Amendments and Coming Into Force.

(Clause 19, which deals with the timely transmission of documents to a Review Board, is discussed after clause 14 in Part B above on Disposition Hearings.)

3. Publication Bans to Further Protect Third Parties (considered but not proposed)

The Standing Committee noted that subsections 672.51(7) and (11) of the Code take into account the interests of the accused when determining whether information should be withheld, and suggested in Recommendation 7 that the subsections be amended to better protect also the privacy interests of victims, children and family members.

In its Response, the government indicated that victims and witnesses would be protected through amendments allowing a Review Board to order similar publication bans as a court (see clause 17), but that additional amendments to give courts and Review Boards broader authority to prohibit publication of other information might not conform to the prevailing common law, which requires a careful balancing of competing Charter rights.[39]

D. Dispositions by a Court or Review Board (Clauses 20 to 23)

Section 672.54 of the Code sets out the dispositions available to a court or Review Board for an accused found not criminally responsible on account of mental disorder or unfit to stand trial. A court, when making a disposition under s. 672.45(2), or Review Board, when making a disposition in the court's place under s. 672.47, may order: (a) an absolute discharge, where the accused is not a significant threat to the safety of the public; (b) a discharge (i.e., release into the community) subject to conditions; or (c) detention in custody in a hospital with any appropriate conditions. Section 672.54 requires a court or Review Board to make the least onerous and least restrictive disposition, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused.

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(39) *Response*, pp. 16-17.

Clause 20 amends s. 672.54 of the Code so that it is clear that the dispositions available and factors to consider also apply when a Review Board reviews a disposition under s. 672.83. (See Part F below on Review of Dispositions.)

Clause 21 amends s. 672.541 of the Code, which allows a court or Review Board to consider a filed victim impact statement in determining the appropriate disposition for a mentally disordered accused, to the extent that the statement is relevant to the factors listed in s. 672.54. Specifically, s. 672.541 would be amended so that a victim impact statement may clearly be considered not only during an initial disposition hearing under s. 672.45 (by a court) or s. 672.47 (by a Review Board), but also during a Review Board hearing to review the initial disposition under s. 672.81 (mandatory review) or s. 672.82 (discretionary review). (See Part F below on Review of Dispositions.)

Clause 22 repeals subsection 672.55(2), which provides that a court's disposition to detain the accused in hospital under s. 672.54(c) may not be in force for more than 90 days. This is presumably because a Review Board must review the court's disposition within 90 days in any event (see s. 672.47(3) in clause 15).

Clause 23 clarifies the period for which a disposition is in effect under s. 672.63 of the Code. In addition to making some stylistic changes to the English and French versions of the section, it makes it clear that a disposition remains in effect until a subsequent disposition is actually made after a review hearing, and not just until a hearing under certain sections of the Code is held. In other words, the initial disposition will clearly remain in effect if no new disposition is made, or if there is a delay between the hearing and the ordering of a new disposition.

E. Repeal of Unproclaimed Provisions (Clauses 24 to 26, 37 to 39, 41 and 12)

Sections 672.64 to 672.66 of the Code on the capping of dispositions and dangerous mentally disordered accused were enacted in 1991 by Bill C-30 (*An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and Young Offenders Act in consequence thereof*) but never proclaimed. Likewise, provisions on hospital orders were enacted in ss. 747 to 747.8 in Part XXIII (Sentencing), but never proclaimed.[40]

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(40) The history below for the three sets of provisions is adapted from Pilon (2002) and Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code* (2002).

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1. Capping of Dispositions

The unproclaimed s. 672.64 of the Code would have limited the period during which a mentally disordered accused may be detained, based on the nature of the offence. It defines "designated offence" as an offence set out in a schedule to Part XX.1, certain offences under the *National Defence Act*, or any conspiracy, attempt or counselling in relation to those offences. The schedule lists various offences under the Code and other Acts that are considered to be serious, such as sabotage, hijacking, using explosives or firearms in the commission of an offence, sexual offences, assault, abduction, robbery and arson. "Cap" is defined in s. 672.64(1) as the maximum period during which a mentally disordered accused may be subject to one or more dispositions in respect of an offence, beginning at the time the verdict is rendered.

Where there is a verdict of not criminally responsible on account of mental disorder or unfit to stand trial, s. 672.64 provides the following caps: life for offences such as murder or treason; the shorter of ten years or the maximum period during which the accused would have been liable for imprisonment for designated offences prosecuted by indictment; and the shorter of two years or the maximum period during which the accused would have been liable to imprisonment for all other offences. The offence with the longest cap is to be used where there have been two or more offences. Further, a disposition may be consecutive where the accused is already subject to a disposition other than an absolute discharge, even if the overall duration exceeds what would otherwise be the cap.

The capping provisions were intended to prevent a mentally disordered accused from being detained for a longer period than would have been the case after a conviction. However, they were not meant to result in the release of dangerous persons into the community at the end of the maximum period of detention. The intention was that an accused still perceived to be dangerous at the end of the statutory cap could be involuntarily committed to a secure hospital under the authority of the provincial mental health legislation.[41] Further, the possibility of a finding that an accused was a "dangerous mentally disordered accused" could also increase the cap. In order to allow time for any necessary changes to provincial laws and administrative practices, the federal government proposed delaying proclamation of the capping provisions. At the same time, the transitional provisions in s. 10 of Bill C-30 specified that any existing lieutenant governor warrants for the detention of an accused would continue until the capping provisions were proclaimed in force.

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(41) Department of Justice Canada, *Mental Disorder Amendments to the Criminal Code*, Information Paper, Ottawa, September 1991, p. 6.

While the capping provisions were intended to respond to criticism of the detention of a mentally disordered accused for an indefinite period of time, the Supreme Court of Canada has determined that the potentially indefinite period of supervision under Part XX.1 of the Code does not offend s. 7 or 15 of the Charter.[42] The Court has explained that the scheme is intended not to punish but to treat and rehabilitate, an annual review of a disposition protects the rights and liberty of the accused, and a significant threat to the safety of the public is a proper factor in curtailing liberty in appropriate circumstances. Further, the disposition in respect of a mentally disordered accused, and any conditions attached to it, must be the least onerous and least restrictive, given individual circumstances such as the accused's mental condition, needs and reintegration into society.[43] If the accused poses no significant threat to the safety of the public, the Supreme Court has stated that an absolute discharge is the appropriate disposition.[44]

Both the Standing Committee in Recommendation 13 and the government in its Response[45] have pointed out a general consensus among the provinces that capping is not necessary and that current procedures ensure that only persons who continue to pose a threat to the public are detained.

2. Dangerous Mentally Disordered Accused

The unproclaimed s. 672.65 of the Code would have allowed for an increase of the maximum period of detention of a mentally disordered accused. It defines "serious personal injury offence" as the commission of, or attempt to commit, particular serious offences for which the accused would be liable to imprisonment for ten years or more. The particular offences are various sexual assault offences or a designated offence prosecuted by indictment involving the use or attempted use of violence or conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage.

Had s. 672.65 been proclaimed, a prosecutor would have been able to apply for a finding that an accused is a dangerous mentally disordered accused, which is an accused who has committed a serious personal injury offence and constitutes a threat to the life, safety, physical or mental well-being of other persons. The finding would need to be based on evidence

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(42) *Winko* v. *British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Orlowski* v. *British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 733; and *R.* v. *Lepage*, [1999] 2 S.C.R. 744.

(43) See also *Pinet* v. *St. Thomas Psychiatric Hospital*, 2004 SCC 21; *Penetanguishene Mental Health Centre* v. *Ontario (Attorney General) and Tulikorpi*, 2004 SCC 20; and *R.* v. *Owen*, 2003 SCC 33.

(44) *Winko* v. *British Columbia (Forensic Psychiatric Institute)*, para. 3.

(45) *Response*, pp. 25-27.

establishing repetitive behaviour likely to endanger others, a pattern of persistent aggressive behaviour, or any behaviour that is of such a brutal nature as to compel the conclusion that the accused is unlikely to be inhibited by normal standards of behavioural restraint. In the case of a sexual assault offence, the court could also determine that the offender is a dangerous mentally disordered accused on the basis that he or she is likely to cause harm to others due to a failure to control sexual impulses. On making a finding of dangerous mentally disordered accused, the court would be able to increase the cap, or maximum period of detention, to life.

The unproclaimed s. 672.66 makes the procedure for an application for a finding of dangerous offender under ss. 754 to 758 of the Code applicable to an application for a finding of dangerous mentally disordered accused.

The provisions on dangerous mentally disordered accuseds were intended to address concerns about the capping provisions and the limitations of provincial laws with respect to committing dangerous persons to psychiatric care. Specifically, they would have allowed the courts, in special circumstances, to increase the applicable cap to a maximum of life. As with the dangerous offender provisions, the prosecutor would have to establish that the accused had been convicted of a serious personal injury offence and that past conduct suggested that he or she posed a threat or would be likely to cause harm to others in the future.

The transitional provisions of Bill C-30 called for the appointment of a commissioner to review the cases of individuals already subject to a lieutenant-governor warrant of indefinite custody to determine whether they would have qualified as a dangerous mentally disordered accused under the proposed law. In the event of such a finding, the commissioner would then be empowered to order detention in custody for a maximum period of life. Proclamation of the provisions on mentally disordered accused was delayed because they would not be required until the capping provisions came into force.

The Standing Committee in Recommendation 14, and the government in its Response,[46] agree that the provisions on dangerous mentally disordered accused are unnecessary if the capping provisions are repealed.

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(46) *Ibid.*

3. Hospital Orders

In a 1976 report,[47] the Law Reform Commission argued that a therapeutic disposition should be available for persons who are held criminally responsible for their actions but who are nevertheless suffering from a mental disorder. When proclaimed, s. 747.1 of the Code would give judges the power to order detention in a treatment facility for up to 60 days as the initial part of a sentence of imprisonment where the offender is suffering from a mental disorder "in an acute phase" and immediate treatment is urgently required to prevent further significant deterioration of the mental or physical health of the offender, or to prevent the offender from causing serious bodily harm to others.

Section 747 sets out various definitions, s. 747.2 allows the court to choose the treatment facility, and s. 747.3 requires a hospital order to have the consent of the accused and the person in charge of the treatment facility. Section 747.4 precludes a hospital order in certain cases, s. 747.5 provides for the offender's transfer to prison or another treatment facility, and s. 747.6 states that detention under a hospital order counts as service of the prison term. Finally, s. 747.7 allows detention pending an appeal and s. 747.8 states that a copy of the hospital order and warrant for committal must be sent to both the prison and treatment facility.

In response to the concerns of some provincial governments about the onerous costs of these provisions, their proclamation was postponed to allow pilot projects to be conducted in two or three provinces so that empirical data could be gathered on utilization and costs.[48] The hospital orders provisions, however, remain unproclaimed to date.

The Standing Committee in Recommendation 15, and the government in its Response,[49] have pointed out that treatment of mentally ill offenders may be achieved by other means, such as an administrative transfer from a correctional facility to a psychiatric facility, and that a 60-day treatment order is likely to be ineffective in any event for many disorders. Both also concluded that proclamation of the provisions on hospital orders would affect the resources of the provinces and territories, who generally do not support proclamation.

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(47) Law Reform Commission of Canada, *Mental Disorder in the Criminal Process*.

(48) Edwin A. Tollefson and Bernard Starkman, *Mental Disorder in Criminal Proceedings*, Carswell, Scarborough, Ont., 1993, p. 144.

(49) *Response*, p. 28.

4. Specific Proposed Amendments (Clauses 24 to 26, 37 to 39, 41 and 12)

Clause 24 repeals ss. 672.64 to 672.66 of the Code, which are the provisions on capping of dispositions and dangerous mentally disordered accuseds.

Clause 25 amends s. 672.67(2) of the Code on dual status offenders by removing a reference to a hospital order. A "dual status offender" is an offender who is subject to a sentence of imprisonment with respect to one offence and a custodial disposition under s. 672.54(c) requiring that he or she be detained in hospital in respect of another offence for which the verdict was not criminally responsible on account of mental disorder or unfit to stand trial. Section 672.67 provides that pending a Review Board's decision as to the place of custody of a dual status offender, the most recent disposition takes precedence, whether imprisonment or detention in hospital under s. 672.54(c). Clause 25 removes an exception in s. 672.67(2) by which a prior hospital order under s. 747 (which would be repealed) takes precedence over detention in hospital under s. 672.65(c).

Clause 26 repeals ss. 672.79 and 672.8 of the Code, which are the provisions on appealing a finding, or failure to find, that an offender is a dangerous mentally disordered accused.

(Clauses 27 to 36 are discussed in other parts of Description and Analysis below).

Clause 37 repeals the schedule of "designated offences" in Part XX.1 of the Code, which are offences for which a particular cap is set and for which a finding of dangerous mentally disordered accused may be found where there has been a serious personal injury offence. The schedule is unnecessary given the repeal of the capping provisions.

Clause 38 removes a reference to s. 747.1 (hospital orders) from the definition of "sentence" in s. 673 in Part XXI (Appeals – Indictable Offences) of the Code.

Clause 39 repeals ss. 747 to 747.8 under Part XIII (Sentencing) of the Code, which are the provisions on hospital orders.

(Clause 40 is discussed after clause 11 in Part A above on Assessment Orders.)

Clause 41 repeals Form 51, "Hospital Order," in Part XXVIII (Miscellaneous) of the Code.

Clause 12 repeals paragraph 672.21(3)(c) of the Code, which allows an otherwise protected statement to be admissible for the purpose of determining whether the accused is a dangerous mentally disordered accused under s. 672.65 (which is also repealed). Section 672.21 provides that a protected statement, which is one made by the accused during an ordered assessment or treatment, is not admissible as evidence without the consent of the accused.

F. Review of Dispositions (Clauses 27 to 32)

Under s. 672.81(1) of the Code, a Review Board must hold a hearing annually to review an accused's disposition other than an absolute discharge. Under subsections (2) and (3), it must also hold a review hearing as soon as practicable on receiving notice that the place where the accused is being detained has significantly increased restrictions on the accused's liberty for more than seven days,[50] the place has requested a review hearing, or the accused has subsequently become subject to a sentence of imprisonment, i.e., become a dual status offender. Section 672.82 provides for a discretionary review hearing at the request of a party.

Section 672.83 provides that a review hearing may result in any other disposition the Review Board considers appropriate in the circumstances, except where a determination is made under s. 672.48(1) that the accused is fit to stand trial. In that case, the accused would be sent back to court for the court to render a verdict on the issue of fitness.

1. Power of Review Board to Extend Time for Review Hearing and Hold Review Hearing of Own Motion (Clauses 27 and 28)

Clause 27(1) makes some stylistic changes to the French version of subsection 672.81(1). Clause 27(2) amends s. 672.81(2) of the Code regarding mandatory review hearings by allowing a Review Board to hold a review hearing later than 12 months after an accused's disposition or the most recent review. A new subsection (1.1) permits a Review Board to extend the time up to 24 months after making or reviewing a disposition, if the accused is represented by counsel, and counsel for both the accused and the Attorney General consent. An extension of up to 24 months will also be possible under a new subsection (1.2), without the consent of the parties, if (a) the accused has been found not criminally responsible for a serious personal injury offence, (b) the accused is subject to hospital detention under s. 672.54(c), and (c) the Review Board is satisfied on the basis of relevant information, including disposition information and an assessment report, that the condition of the accused is not likely to improve and detention is necessary for the period of the extension.

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(50) Under s. 672.56 of the Code, a Review Board may delegate to the person in charge of the hospital authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in the disposition.

"Serious personal injury offence" is defined in a new subsection 672.81(1.3) as an indictable offence involving the use or attempted use of violence, an indictable offence involving conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person, or an indictable offence, or attempt to commit such an offence, under any of ss. 151 (sexual interference with a person under 14), 152 (invitation to sexual touching with a person under 14), 153 (sexual exploitation of a young person), 153.1 (sexual exploitation of a person with a disability), 155 (incest), 160 (bestiality), 170 (parent or guardian procuring sexual activity), 171 (householder permitting sexual activity), 172 (corrupting children), 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) and 273 (aggravated sexual assault).

Clause 27(2) also adds subsection 672.81(1.4) requiring a Review Board to give notice to the accused and the hospital detaining him or her, where an extension is made due to a serious personal injury offence. An appeal of a Review Board's decision to extend the time for holding a review hearing will be available under a new subsection (1.5), which provides that such a decision is considered to be a disposition for the purposes of ss. 672.72 and 672.78. Section 672.72 sets out the grounds for an appeal of a disposition under Part XX.1 of the Code and s. 672.78 sets out the powers of the Court of Appeal.

Clause 28 amends s. 672.82(1) of the Code regarding discretionary review hearings by allowing a Review Board to hold a review of its own motion, and not only at the request of a party. In that case, a new subsection (1.1) would require the Review Board to give notice to all parties.

2. Procedure at and Following Review Hearing (Clauses 29 and 30)

Clause 29 repeals s. 672.83(2) of the Code, which makes other particular sections of the Code applicable, with necessary modifications, to a disposition following a review hearing. Those other sections are: 672.52(3) (Review Board shall provide reasons), 672.64 (provisions on capping of dispositions, which will be repealed), 672.71 (detention of a dual status offender pursuant to a placement decision counts as service of term of imprisonment), 672.72 to 672.78 (provisions on appeals, which will be applicable by virtue of a new s. 672.81(1.5)), 672.79 and 672.80 (provisions on dangerous mentally disordered accused, which will be repealed), 672.81 (mandatory review hearings) and 672.82 (discretionary review hearings). The references to ss. 672.81 and 672.82 will presumably be removed as being redundant to the understanding that a review hearing disposition may itself be subject to another review hearing.

Clause 30 repeals s. 672.84 of the Code, which provides that a review hearing under s. 672.81 or 672.82 is subject to the same procedure as a disposition hearing set out in s. 672.5. This is presumably because the English version of s. 672.5(1) already states that the section applies to a hearing held by a Review Board to make or review a disposition, while the French version of s. 672.5(1) states that the section applies to a hearing held by a Review Board to determine the disposition taken in respect of an accused.

3. Power of Review Board to Compel Appearance of Accused (Clauses 31 and 32)

Clause 31 adds the heading "Power to Compel Appearance" before s. 672.85, which provides for the bringing of an accused before a Review Board.

Clause 32 amends s. 672.85, under which a Review Board may order a person having custody of an accused to bring him or her to a review hearing, or may issue a summons or warrant to compel the appearance of an accused who is not in custody. Specifically, s. 672.85 contemplates bringing an accused before a Review Board not only for a mandatory review hearing under s. 672.81, but for any hearing before the Review Board, including where the accused did not attend a previous hearing in contravention of a summons or warrant. Clause 32 further amends s. 672.85 by allowing a Review Board under subsection (2) to order the accused's appearance "as soon as practicable" and not just at a specified time.

4. Interim Temporary Detention (considered but not proposed)

Given the failure of some accused to attend Review Board hearings, the Standing Committee suggested in Recommendation 9 that s. 672.85 be amended to allow the interim temporary detention of an accused. In its Response, the government indicated that the recommendation would require a more thorough review, particularly given the rights of the accused under the Charter.[51]

G. Persons Found Unfit to Stand Trial (Clauses 13 and 33)

When an accused has been found by a court to be unfit to stand trial, s. 672.32 of the Code contemplates that he or she may be found to be fit at a later date. Under s. 672.48, a Review Board making or reviewing a disposition in respect of an accused found unfit to stand

(51) *Response*, pp. 19-20.

trial must determine whether the accused has become fit and if so, send him or her back to court. If the court has not made a disposition, section 672.47 requires the first hearing of the Review Board to take place within 45 days, or 90 days with an extension by the court. The hearing must take place within 90 days if the court has made a disposition other than an absolute discharge. If the court has granted an unfit accused an absolute discharge, the matter does not go before a Review Board.

1. Court May Extend Deadline for Inquiry into *Prima Facie* Case (Clause 13)

If a Review Board determines that the accused remains unfit, s. 672.33 provides for periodic inquiries by the court into whether there remains sufficient evidence to hold a trial, i.e., a *prima facie* case. The inquiry must take place within two years of the verdict of unfit to stand trial, and every two years after that, until the accused is either acquitted or tried. The accused may apply for an earlier inquiry on the basis that there is reason to doubt that a *prima facie* case exists. When the court holds an inquiry, the prosecution has the burden of showing that there is sufficient evidence to put the accused to trial; and if there is not, the court must acquit the accused. If there remains sufficient evidence and the accused has become fit to stand trial, the court may direct a trial. If there remains a *prima facie* case against the accused but he or she remains unfit to stand trial, the accused will neither be tried nor acquitted, necessitating another inquiry within two years.

Clause 13 adds a subsection to s. 672.33 under which the court may extend the two-year deadline for an inquiry when necessary for the proper administration of justice.

2. Stay of Proceedings for Permanently Unfit Accused (Clause 33)

In circumstances where an accused has been found unfit to stand trial but there is little or no likelihood that he or she will ever become fit, s. 672.54 of the Code precludes an absolute discharge. A court or Review Board may order only detention in a hospital or a conditional discharge, in which case the accused might be permitted to live in the community. Periodic inquiries as to whether there is a *prima facie* case against the accused must continue to be held.

Clause 33 adds a new s. 672.851 to the Code, under which a Review Board may recommend that a court hold an inquiry to determine whether a stay of proceedings should be entered in the case of a person who is unlikely to become fit to stand trial and poses no

significant threat to the public. A stay of proceedings would have the effect of stopping any further legal action. It would not be the same as an absolute discharge, which was the disposition for a permanently unfit accused that was suggested by the Standing Committee in Recommendation 5. The Standing Committee also suggested that a court be able, of its own motion, to address the case of a permanently unfit accused. This was presumably found to be unnecessary, as following a court's verdict of unfit to stand trial, the accused is supervised by a Review Board which is in a better position to address his or her status. Still, both the Standing Committee and the government in its Response[52] agreed that a final disposition with respect to a permanently unfit accused should only be made by a court.

The following summarizes the eight subsections of the new s. 672.851:

> (1) Of its own motion, a Review Board may recommend that the court having jurisdiction over the accused hold an inquiry to determine whether there should be a stay of proceedings. The Review Board may make the recommendation where it has held a review hearing under s. 672.81, and on the basis of relevant information such as disposition information or an assessment report believes that the accused remains unfit to stand trial, is not likely to become fit to stand trial, and does not pose a significant threat to the safety of the public.
>
> (2) If the Review Board recommends an inquiry, it must provide notice to the accused, prosecutor and any party the Review Board believes has a substantial interest in protecting the interests of the accused (e.g., family members, mental health care professionals).
>
> (3) As soon as practicable after receiving a recommendation, the court may hold an inquiry.
>
> (4) If the court holds an inquiry, it must order an assessment of the accused.
>
> (5) The provisions under s. 672.51, on disclosure and withholding disposition information and records of the proceedings, apply to the inquiry. (See the comments on clause 18 above in Part C on Publication Bans for a discussion on disposition information.)
>
> (6) On completion of an inquiry, the court may order a stay of proceedings if satisfied that the accused remains unfit to stand trial, is not likely to become fit to stand trial, does not pose a significant threat to the safety of the public, and a stay of proceedings is in the interests of the proper administration of justice.

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(52) *Response*, p. 12.

> (7) Whether a stay of proceedings is in the interests of the proper administration of justice must be determined from the submissions of the prosecutor, accused and all other parties and from the following factors: the nature and seriousness of the alleged offence; the salutary and deleterious effects of a stay of proceedings, such as any effect on public confidence in the administration of justice; whether there has been an inquiry regarding a *prima facie* case against the accused under s. 672.33; and any other factor the court considers relevant.
>
> (8) If a stay of proceedings is ordered, any disposition in respect of the accused ceases to have effect. If one is not ordered, the finding of unfit to stand trial and any disposition remain in force until the Review Board holds a review hearing and makes another disposition under s. 672.83.

A proposed new s. 672.852 will permit an appeal from an order granting a stay of proceedings in respect of a permanently unfit accused. If it is of the opinion that the order is unreasonable or cannot be supported by the evidence, the Court of Appeal may set aside the stay of proceedings and restore the finding of unfit to stand trial and the disposition. However, an appeal will not be permitted from a failure to grant a stay of proceedings. This is because s. 672.852 will be a discretionary provision that can be used by the court following a recommendation by a Review Board, and not a process that the accused can initiate.[53]

H. Interprovincial Transfer of an Accused (Clause 34)

Section 672.86 of the Code allows the transfer to another place in Canada of an accused who is being detained in, or is directed to attend, a hospital as a result of a disposition under s. 672.54(c) or a treatment order for the purpose of becoming fit to stand trial under s. 672.58. The transfer must be recommended by the Review Board of the current jurisdiction for the purpose of the accused's reintegration into society, recovery, treatment or custody. It also requires the consent of the Attorneys General of the provinces to and from which the accused is to be transferred.

Clause 34 amends s. 672.86(1)(b) so that consent for the transfer may be given by an officer authorized by each of the Attorneys General.

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(53) House of Commons, *Debates*, 3 May 2004, 13:25 (Hon. Paul Macklin).

Clause 34 also amends the provisions under which an accused not already detained in custody (e.g., living in the community with conditions) may be transferred. It will be clear under a proposed subsection 672.86(2.1) that the transfer must be on the recommendation of a Review Board for the purposes of reintegration, recovery or treatment. The transfer of an accused not detained in custody will also require the consent of the relevant Attorneys General, or their authorized delegates. The transfer will require an order for detention and transfer by the Review Board of the province from which the accused is to be transferred, rather than the Review Board of the province where the accused is directed to attend for detention or treatment, should those not be the same. As is currently the case, the transfer will require a warrant specifying the place in Canada to which the accused is to be transferred. However, the order will be subject to any conditions considered appropriate by either province's Review Board, rather than just the transferring one. Clause 34 also makes some stylistic changes to the English and French versions of subsection 672.86(3).

Section 672.87 to 672.89 of the Code will not be affected by Bill C-29. These provisions give any person responsible for the custody of the accused authority to act on the warrant to transfer the accused, grant jurisdiction to the receiving province's Review Board subject to an agreement otherwise, and reserve jurisdiction by the original Review Board where the transfer is not carried out in accordance with s. 672.86, subject to an agreement otherwise.

Consideration of the provisions on transferring an accused was further to the Standing Committee's Recommendation 12. While the Standing Committee also suggested the possibility of improvements to the procedure for transferring youth to adult treatment facilities, the government indicated in its Response that an examination of the treatment of mentally disordered young persons was more appropriate in the context of a review specifically aimed at the youth criminal justice system.[54]

I. Enforcement of Orders Where Contravened (Clauses 35 and 36)

1. Arrest and Appearance of Accused (Clauses 35 and 36)

Clause 35 amends the French version of 672.9 of the Code so that it refers to an assessment order rather than just an order. Section 672.9 provides that any warrant or process issued by a province in relation to an assessment order or disposition may be executed anywhere in Canada.

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(54) *Response*, p. 25.

Clause 36 amends ss. 672.91 to 672.94 of the Code, which allow the arrest of an accused who fails to comply with a disposition, require him or her to be brought before a justice, permit his or her release or delivery to a Review Board, and give the Review Board authority to deal with the accused.

Section 672.91 of the Code allows a peace officer to arrest an accused without a warrant at any place in Canada if the peace officer believes on reasonable grounds that the accused has contravened or failed to comply with a disposition or condition. The English and French texts of section 672.91 differ somewhat. Basically, the current English refers to the "disposition" but omits the "assessment order," whereas the current French does just the opposite, and refers simply to an "order" rather than an "assessment order." Clause 36 inserts the respective missing elements in each language.

Section 672.92 of the Code requires a peace officer to bring an accused before a justice without reasonable delay, in any event within 24 hours, and as soon as practicable if a justice is not available within 24 hours. Clause 36 amends s. 672.92 so that a peace officer may release the accused in certain circumstances, issuing a notice to appear rather than taking the accused to appear before a justice. A peace officer will also be able to deliver the accused to a place of custody specified in an assessment order or disposition.

The subsections of the new s. 672.92 may be summarized as follows:

> (1) Subject to subsection (3), a peace officer may as soon as practicable release an accused suspected of contravening a disposition or assessment order and issue a summons or appearance notice.
>
> (2) Notice of the summons or appearance notice must be given to the Review Board of the province in which the disposition or assessment order was made.
>
> (3) A peace officer must not release the accused if he or she believes on reasonable grounds that detention is necessary in the public interest, having regard to all of the circumstances, including the need to establish the accused's identity, establish the terms and conditions of the disposition or assessment order, and prevent the commission of an offence. Release is also not allowed if the accused is believed to be subject to a disposition or assessment order of a court or Review Board of another province, or it is reasonably believed that the accused will fail to attend before the Review Board.

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> (4) A peace officer may also deliver the accused to the place specified in the assessment order or disposition, whether a conditional discharge or an order for detention in hospital.
>
> (5) If a peace officer does not release the accused or deliver him or her to a specified place of custody, the accused must be brought before a justice without reasonable delay and in any event within 24 hours.
>
> (6) If a justice is not available within 24 hours, the accused must be brought before a justice as soon as practicable.

Section 672.93 of the Code requires a justice to release an accused unless satisfied that there are reasonable grounds to believe that the accused has contravened or failed to comply with a disposition. If satisfied, the justice may make an order that is appropriate in the circumstances, pending a hearing of the Review Board of the province where the disposition was made. Notice of the order must be given to that Review Board.

Clause 36 adds failure to comply with an assessment order as a basis for a justice's decision not to release the accused under s. 672.93. In that case, the justice's order would be made pending a hearing by the court or Review Board with respect to the assessment order, and notice would be given to that court or Review Board. Clause 36 also expressly contemplates an order that the accused be returned to a place specified in the disposition or assessment order.

Section 672.94 of the Code provides that a Review Board receiving notice of an accused's suspected breach of an order must perform the duties set out in the provisions on disposition hearings and review of dispositions. Clause 36 amends the section by adding a reference to the new s. 672.92(2), under which notice might come by way of a peace officer rather than a court. Finally, clause 36 makes some stylistic changes to the English and French versions of s. 672.93 and 672.94.

2. Interim Temporary Detention and Offence of Failing to Comply
(considered but not proposed)

The Standing Committee suggested in Recommendation 9 that s. 672.91 be amended to allow a peace officer to detain an accused pending appearance before a justice. It also called for the creation of an offence for failing to comply with a disposition order.

The government indicated in its Response that given the Charter rights of the accused and other factors, a broader examination would be necessary in considering interim detention.[55] The creation of a new offence for breaching a disposition order would also require further review, given that additional criminal proceedings may be detrimental to treatment and recovery. The government pointed out the complexity of a dual regime where a person might be subject to the mental disorder provisions for a predicate offence but subject to criminal sanctions (or again found not criminally responsible on account of mental disorder) for the breach of a disposition relating to the first offence.

(Clauses 37 to 41 are discussed or referred to above in Part E on Repeal of Unproclaimed Provisions.)

Clause 42 makes linguistic changes to the French versions of several sections of the Code by changing "audition" to "audience" as the translation for the English "hearing."

J. Consequential Amendments (Clauses 43 to 63)

1. Miscellaneous Acts (clauses 43 to 46, 62 and 63)

Clause 43 amends sections of *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof*,[56] as a result of the proposed repeal of ss. 672.64 to 672.66 of the Code, which are the unproclaimed provisions relating to the capping of dispositions and dangerous mentally disordered accused (see clause 24).

Clause 44 repeals a coordinating provision of *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*,[57] concerning the definition of "sentence" in s. 673 of the Code, as a result of the proposed repeal of the unproclaimed s. 747.1 of the Code relating to hospital orders (see clause 38).

Clause 45 amends a coordinating provision of *An Act to amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Release Act*,[58] as a result of the proposed removal of a reference to s. 747.1 (hospital orders) from the definition of "sentence" in s. 673 of the Code (see clause 38).

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(55) *Response*, pp. 19-20.

(56) S.C. 1991, c. 43.

(57) S.C. 1995, c. 22.

(58) S.C. 1999, c. 5.

Clause 46 repeals a coordinating provision of *An Act to amend the Criminal Code (victims of crime) and another Act in consequence*,[59] as a result of the repeal proposed in clause 44.

Clause 62 repeals a coordinating provision of the *Nuclear Safety and Control Act*,[60] as a result of the proposed repeal of the unproclaimed s. 672.64(1) of the Code relating to the capping of dispositions and designated offences set out in the schedule to Part XX.1 (see clauses 24 and 37).

Clause 63 amends s. 141(1) of the *Youth Criminal Justice Act*,[61] which makes the mental disorder provisions of the Code applicable to young persons with the necessary modifications, except to the extent that they are inconsistent with the *Youth Criminal Justice Act*. Specifically, an exception that ss. 672.65 and 672.66 of the Code never apply to young persons will be removed, as those sections on dangerous mentally disordered accuseds will be repealed (see clause 24).

2. *National Defence Act* (Clauses 47 to 61)

Clauses 47 to 61 make consequential amendments to sections of the *National Defence Act*[62] that are comparable to the mental disorder provisions of the *Criminal Code* with respect to military offences and court martial proceedings.

Clause 47 repeals the unproclaimed s. 149.1 of the *National Defence Act*, which allows a court martial to order detention as though it were a court making a hospital order under the Code. This is due to the proposed repeal of the provisions on hospital orders in the Code (see clause 39).

Clause 48 adds a subsection before s. 202.12(2) of the *National Defence Act*. Under the new subsection, the Chief Military Judge may extend the period for holding an inquiry into whether there remains sufficient evidence to hold a trial, i.e., a *prima facie* case, following a verdict of unfit to stand trial (analogous to clause 13 discussed above in Part G on Persons Found Unfit to Stand Trial).

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(59) S.C. 1999, c. 25.

(60) S.C. 1997, c. 9.

(61) S.C. 2002, c. 1.

(62) R.S.C. 1985, c. N-5.

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Clause 49 adds a new section 202.121 to the *National Defence Act*, under which a Review Board can recommend that a court martial be convened for an inquiry to determine whether a stay of proceedings should be entered in the case of a person who is unlikely to become fit to stand trial and poses no significant threat to the public (analogous to the proposed s. 672.851 of the Code in clause 33 discussed above in Part G on Persons Found Unfit to Stand Trial).

Clauses 50, 51 and 52 amend subsections 202.17(1), 202.18(1) and 202.19(1) of the *National Defence Act* to clarify that a reference to an assessment order is to one made by a court martial, and not a Review Board.

Clause 53 amends s. 202.2 of the *National Defence Act* to clarify that a court martial's disposition in respect of a mentally disordered accused remains in force until a Review Board actually makes another disposition, rather then merely holds a hearing (analogous to clause 23 discussed above in Part D, on Dispositions by a Court or Review Board). Clause 53 also changes a reference in s. 202.2 from s. 202.25 of the *National Defence Act* to s. 672.83 of the Code, as a Review Board's review hearing is under the latter.

Clause 54 removes a reference to hospital orders in s. 202.21(3)(a) of the *National Defence Act* on the precedence of dispositions, as a result of the proposed repeal of the provisions on hospital orders (see clause 39).

Clause 55 amends subsection 202.22(3) of the *National Defence Act* to ensure the timely transfer of transcripts, documents, information and exhibits from a court martial to a Review Board, whether or not the court martial holds a hearing or makes a disposition (analogous to clauses 15 and 19 discussed above in Part B on Disposition Hearings).

Clause 56 amends subsection 202.23(3) of the *National Defence Act* to allow an officer who has arrested a mentally disordered accused for violation of a disposition to take him or her to the place of custody specified in the disposition, rather than to a justice or commanding officer (analogous to parts of clause 36 discussed above in Part I on Enforcement of Orders Where Contravened).

Clause 57 repeals paragraph 202.24(3)(c) of the *National Defence Act*, which refers to dangerous mentally disordered accused in the context of statements that may be admissible as evidence (analogous to clause 12 discussed above in Part E on Repeal of Unproclaimed Provisions). This is because the provisions on dangerous mentally disordered persons in the Code will also be repealed.

Clause 58 amends s. 202.25 of the *National Defence Act*, which authorizes Review Boards to exercise powers and perform duties with respect to persons whom court martial proceedings find unfit to stand trial or not responsible on account of mental disorder. Rather than listing specific sections of the *Criminal Code* that apply, the amended section makes a general reference to the *Criminal Code* and allows for modifications where necessary. However, it includes an exception in that Review Boards may not exercise their powers under the Code's ss. 672.851 (stay of proceedings) and 672.86 to 672.89 (interprovincial transfers). This is presumably because the *National Defence Act* itself includes provisions relating to these matters. Clause 58 also adds a subsection to s. 202.25 of the *National Defence Act* clarifying that where a Review Board makes an assessment order under the proposed new s. 672.121 of the *Criminal Code* for the purpose of recommending that a court hold a stay of proceedings inquiry, it is to be read as being for the purpose of a stay of proceedings inquiry under the relevant section of the *National Defence Act*.

Clause 58 also amends s. 202.26 of the *National Defence Act*, which makes particular sections of the Code applicable, with necessary modifications, to a court martial's findings of unfit to stand trial or not criminally responsible on account of mental disorder. Portions of s. 202.26 referring to the Code's provisions on capping of dispositions and dangerous mentally disordered accused (ss. 672.64, 672.65, 672.79, 672.8) are removed, as they are repealed by Bill C-29. A reference to s. 754 of the Code, which deals with applications under Part XXIV (Dangerous Offenders) of the Code, is also be removed. As a result of removing all of the unnecessary references, s. 202.26 no longer has any subsections and states only that ss. 672.67 to 672.71 of the Code are applicable and that a reference to a Review Board is to the one of the appropriate province.

Clause 59 adds a subsection to s. 230.1 of the *National Defence Act*, which provides for an appeal to the Court Martial Appeal Court from a court martial in respect of particular matters. Specifically, subsection (f.1) is added, referring to an order for a stay of proceedings under the proposed new subsection 202.121(5) of the *National Defence Act* (see clause 49).

Clause 60 adds a section to the *National Defence Act* to provide for an appeal from an order granting a stay of proceedings in respect of a permanently unfit accused (analogous to the proposed new s. 672.852 of the Code in clause 33 discussed above in Part G on Persons Found Unfit to Stand Trial).

Clause 61 makes linguistic changes to the French versions of several sections of the *National Defence Act* by changing "audition" to "audience" as the translation for the English "hearing" (analogous to clause 42).

K. Coordinating Amendments and Coming Into Force (Clauses 64 and 65)

Clause 64 coordinates proposed amendments in Bill C-12, An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act.[63] Because the substance of s. 486(3) of the Code, which lists the offences for which a publication ban may be warranted, would be amended and become s. 486.4(1) as a result of Bill C-12, clause 64(2) changes the reference from s. 486(3) to s. 486.4(1) in the new s. 672.501(1) proposed in Bill C-29 (see clause 17 above in Part C on Publication Bans). Clause 64(3) repeals either clause 18 of Bill C-29 or clause 22 of Bill C-12, as both make the same amendment to s. 672.51(11) dealing with the prohibited publication of information withheld from a party to a disposition hearing.

Clause 65 brings the provisions of Bill C-29 into force on a day or days to be fixed by order of the Governor in Council.

COMMENTARY

When Bill C-29 was first introduced during the 3rd session of the 37th Parliament, the Parliamentary Secretary to the Minister of Justice stated that the bill is not a wholescale reform of the law but rather the next step in ensuring that legislation is effective, efficient and fair in governing mentally disordered accused.[64] A member from the Conservative party generally agreed that the amendments were appropriate, particularly the use of victim impact statements in limited circumstances, the streamlining of the transfer of an accused to another jurisdiction, and the repeal of the unproclaimed capping provisions. However, a caution was raised regarding stays of proceedings and the need to ensure the public's safety, even where a person is not criminally responsible because of mental disorder.[65] While a member from the

(63) Bill C-12 was passed by the House of Commons and reached first reading in the Senate prior to the dissolution of the 37th Parliament.

(64) House of Commons, *Debates*, 29 April 2004, 17:10 (Hon. Sue Barnes).

(65) *Ibid.*, 17:20 (Vic Toews, MP).

Bloc Québécois expressed the party's support for Bill C-29 in principle, a concern was raised that not all of the Standing Committee's unanimous recommendations had been followed.[66] A New Democratic Party member suggested that Bill C-29 could be improved, particularly by making it easier for a lay person to understand.[67]

At the time of writing, there had been little, if any, commentary on the bill in the media. However, when the government issued its Response to the Standing Committee's Review of the Mental Disorder Provisions in November 2002, a newspaper article raised an issue regarding the increase in the number of Canadians successfully invoking the defence of mental disorder since the 1991 amendments in Bill C-30.[68] The article cited a Justice Canada study showing that 615 accused successfully raised the defence in 1998, compared to 149 in 1991. It further stated that the number of persons raising the defence of mental disorder had grown from 1,232 to 2,418 over the same period. Given that the amendments proposed in Bill C-29 are more procedural in nature, they may not be the appropriate starting point for a debate on the general availability of a defence based on mental disorder. A more specific review would be necessary to resolve any concern about a rise in the number of persons successfully avoiding criminal liability as a result of mental disorder. Nonetheless, the amendments proposed in Bill C-29 do attempt to balance the interests and treatment of mentally disordered accused with the protection of society from danger.

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(66) *Ibid.*, 17:25 (Benoît Sauvageau, MP).

(67) House of Commons, *Debates*, 3 May 2004, 13:10 (Wendy Lill, MP).

(68) Janice Tibbetts, "Justice minister plans to end limit on insanity sentences: 'Not criminally responsible' pleas have soared since '91," *Ottawa Citizen*, 13 November 2002.